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Bailout: Leaving Behind Pennsylvania's Monetary Bail System

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Bailout: Leaving Behind Pennsylvania’s Monetary Bail System

Amy McCrossen*

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I. INTRODUCTION

In Summer 2010, Mustafa Willis—24 years old at the time—was arrested walking down the street in Newark, New Jersey. Suddenly, police officers swarmed Willis. They had found a gun at the scene and placed Willis under arrest for unlawful possession of a firearm. Once Willis was taken to jail, however, he was unable to post his five thousand dollar bail. As a result, he was unable to return to work and to his family. He was unable to gather evidence to support his defense that the gun was not his. Willis was faced with a choice: wait in jail until his trial, or plead guilty to a crime he did not commit. Willis refused to plead guilty to a crime he did not commit, and as a result he lost his job and missed his cousin's funeral. After a few months, the court reduced Willis's bail to three thousand dollars, and he was able to post bail. Willis was then able to find a video that proved the gun did not belong to him. Prosecutors then dismissed the charges. Willis was not completely unimpacted, however—he had spent three months in jail, he owed his bail bondsman three thousand dollars, he lost time with his family, and lost his job. Bail—the criminal justice

*scheme designed to protect defendants who have yet to be convicted of any crime from being detained pre-trial—was precisely what kept Willis in jail.*¹

Mustafa Willis's story illustrates the impact of this country's current reliance on a primarily monetary bail system. The injustice suffered by Willis illustrates how a bail system, while well intentioned, can have adverse consequences for some defendants. These consequences raise questions. How effective is a monetary bail system? If the system is truly ineffective, and the problems outweigh the benefits of the current system, what changes can be made to the pre-trial detention system? Does an entirely new pre-trial detention system need to be designed and implemented?

This article explores the problems associated with Pennsylvania's current monetary bail system. The various problems associated with a monetary bail system merit attention, and this article therefore proposes a solution that will combat these problems. Part II provides an overview of the history and purpose of bail in our criminal justice system. Part III describes Pennsylvania's current monetary bail system in detail and provides data that reveal Pennsylvania's overreliance on monetary bail conditions.

Practical problems associated with a monetary bail system are explained in Part IV, which reviews the negative impacts of monetary bail on the accused, how the bail system undermines its own purpose of ensuring appearance in court, and the long-term impacts that the bail system has on the criminal justice system as a whole. Additionally, Part IV examines how courts have exposed and addressed problems associated with a bail system, the importance of protecting an individual's liberty, and the importance of monetary bail alternatives—particularly for indigent defendants. The existing literature, reviewed in Part IV, calls for reform to the current bail systems. Reform must be individualized by jurisdiction, and Part IV reviews the empirical data that reveal how Pennsylvania's current monetary bail system *causes* the practical problems and impacts defendants and the criminal justice system as a whole.

Part V outlines different jurisdictions' responses to a monetary bail system that focus on pre-trial release, community safety, and ensuring appearance. Part V's review of other jurisdictions' solutions establishes the foundation for proposing reform in Pennsylvania. Part VI then describes the efforts that Pennsylvania has taken to address *some* of its bail problems with the implementation of

1. *Planet Money: New Jersey Bails Out*, NPR (July 12, 2017) (downloaded using iTunes).

risk-assessment tools. Part VII argues that while these reforms are certainly steps in the right direction, empirical data in Pennsylvania reveal that risk-assessment tools alone are insufficient and that radical change is needed. Finally, Part VIII proposes that Pennsylvania should combine an amendment to the Pennsylvania Constitution with non-monetary bail legislation.

II. HISTORY AND PURPOSE OF THE BAIL SYSTEM

A bail system is deeply rooted in the criminal procedures of both federal and state judiciaries. Bail controls the pre-trial detention procedures of defendants who have been charged, but not yet convicted, of a crime in every state.² Bail is seen as a compromise between the criminal justice system and its defendants.³ Its purpose is two-fold.⁴ First, bail ensures that defendants will appear in court for their trial.⁵ Second, bail detains those who the court considers dangerous, thereby protecting public safety.⁶ Bail is also designed to protect the rights of defendants who have not yet been convicted of a crime by avoiding premature punishments, thus maintaining the presumption of “innocent until proven guilty.”⁷

A bail system is also rooted in the United States Constitution. The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required.”⁸ This amendment is incorporated into the bail system to protect defendants from unwarranted pre-trial detention prior to conviction.⁹ Although there is no *guarantee* of bail,¹⁰ courts have held that bail is “excessive” when it is “set at a figure higher than an amount reasonably calculated to fulfill this purpose,” and fixing an unreasonably high bail amount to practically deny bail violates the Eighth Amendment.¹¹ The

2. *Id.*

3. *Id.*

4. Teresa Wiltz, *Locked Up: Is Cash Bail on the Way Out?*, PEW CHARITABLE TRS. (Mar. 1, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/01/locked-up-is-cash-bail-on-the-way-out>.

5. *Id.*

6. *Id.*

7. *Planet Money*, *supra* note 1.

8. U.S. CONST. amend. VIII.

9. *See* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (observing that “[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction”).

10. *See generally* *United States v. Salerno*, 481 U.S. 739, 753 (1987).

11. *Stack*, 342 U.S. at 5.

guarantee that bail not be excessive, however, is arbitrary in a monetary bail system,¹² because even bail that is not excessive—not unreasonably high to fulfill its purpose—can effectively deny a particular defendant pre-trial release, regardless of the amount.

Bail originates at common law; the accused could be released prior to trial based on the good word of the accused's relatives in addition to collateral.¹³ The United States continues to rely primarily on a cash bail system.¹⁴ Jurisdictions differ on how to set bail amounts: some set bail amounts based on the charges alone,¹⁵ while others consider a variety of circumstantial factors (sometimes including a defendant's financial situation) to determine a bail dollar amount.¹⁶ Still others employ risk-based assessment tools that use objective factors in determining whether a defendant should be detained pre-trial.¹⁷ Regardless of the divergence among jurisdictions, the majority of states rely on monetary conditions of release.¹⁸ Pennsylvania is indicative of this type of bail system.

III. PENNSYLVANIA'S CURRENT MONETARY BAIL SYSTEM

Pennsylvania, like many other states, relies on a monetary bail system as a means of achieving the compromise between protecting the accused and ensuring public safety and trial appearance. Bail is defined as “the security or other guarantee required and given for the release of a person, conditioned upon a written undertaking, in the form of a bail bond, that the person will appear when required and comply with all conditions set forth in the bail bond.”¹⁹ After an individual is arrested, magisterial district judges determine whether that individual is eligible for release pending trial.²⁰ In murder or voluntary manslaughter cases, a court of common pleas judge makes bail decisions.²¹ In Philadelphia and Pittsburgh, the Philadelphia Municipal Court and the Pittsburgh Magistrate Court, respectively, set and accept bail regardless of the underlying crime.²² The Pennsylvania State Constitution provides that “[a]ll

12. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 4 (2016).

13. Liana M. Goff, Note, *Pricing Justice: The Wasteful Enterprise of America's Bail System*, 82 BROOK. L. REV. 881, 888-89 (2017).

14. *Id.* at 890.

15. *Id.* at 891.

16. *Id.*

17. *Id.* at 885.

18. *Id.* at 891-92.

19. PA. R. CRIM. P. 103.

20. 42 PA. CONS. STAT. § 1515(a)(4) (2017).

21. *Id.*

22. *Id.* §§ 1123(a)(5), 1143(a)(1).

prisoners shall be bailable by sufficient sureties” and lists two exceptions: (1) capital offenses for which the maximum sentence is life imprisonment, and (2) if no condition other than imprisonment will assure the safety to the community.²³ This language is also reflected in the Pennsylvania Code in its “Right to bail” statute.²⁴

If the defendant falls within one of these exceptions, a magisterial district judge may deem the defendant non-bailable.²⁵ A judge may also deny bail if there is sufficient proof to believe that the defendant will not show up for trial regardless of the amount of bail.²⁶ The non-bailable defendant is then detained in jail to await trial.²⁷ If the defendant does not fall within one of these exceptions, the defendant has a right to bail and is considered bailable.²⁸ There are several routes a magisterial district judge may employ once he or she considers a defendant bailable.²⁹ First, the judge may decide to release the defendant on his or her own recognizance, or on a personal promise by a defendant to appear for trial.³⁰ A second option is to release the defendant on nominal bail, where the defendant must pay a nominal amount of cash, typically one dollar, and the defendant is released based on a designated person or organization’s promise that the defendant will appear for trial.³¹ Third, the judge may also decide to release the defendant with non-monetary conditions, such as pre-trial supervision or special rehabilitative programs.³² Finally, the judge may decide to release a defendant by setting a monetary condition of release.³³

In determining monetary conditions of release, magisterial district judges exercise discretion.³⁴ When setting bail amounts, judges must consider the financial ability of the defendant, as well as factors that are relevant to a defendant’s likelihood of appearance at trial, including: the nature of the offense; record of flight to avoid prosecution; and the defendant’s employment status, family

23. PA. CONST. art. I, § 14; 6 P.L.E. *Bail* § 1 (2017).

24. 42 PA. CONS. STAT. § 5701 (2017).

25. PA. R. CRIM. P. 520; CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 5.

26. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 5.

27. 6 P.L.E. *Bail* § 1 (2017).

28. 42 PA. CONS. STAT. § 5701.

29. PA. R. CRIM. P. 524(C).

30. PA. R. CRIM. P. 524(C)(1); CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 5-6.

31. PA. R. CRIM. P. 524(C)(4).

32. *Id.* at R. 524(C)(2), 527 (nonmonetary conditions of release include reporting requirements, restrictions on travel, or any other appropriate conditions to ensure appearance); CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 6.

33. PA. R. CRIM. P. 524(C)(5). Judges may also release a defendant on an unsecured bail bond, which requires no money be deposited upon release but does impose monetary penalties if the defendant fails to appear. *Id.* at R. 524(C)(3).

34. *Commonwealth v. Miller*, 160 A. 240, 240 (Pa. Super. Ct. 1932).

relationships, length of time in the community, age, mental condition, reputation, addictions, previous appearances, criminal history, or use of false identification.³⁵ The statute does not give weight to any particular factor nor does it require all of these factors be considered—that decision is at the discretion of the magisterial district judge.³⁶ Notably, pre-trial risk-assessment tools³⁷ may also be considered as a factor in reaching a bail determination, but may not be the only means.³⁸

Monetary bonds may be secured or unsecured.³⁹ Unsecured bonds specify an amount of money owed to the court if the defendant fails to appear for their court date, but no money is required for release.⁴⁰ Secured bonds also specify an amount of money owed to the court if the defendant fails to appear for his court date, but require no more than ten percent of that amount be posted before the defendant is released.⁴¹ If a defendant needs help posting his or her bond, he or she may seek help from friends, family members, or organizations.⁴² Other defendants seek help from a bail bondsman, who will post the defendant's bail and require that the defendant pay the bondsman back, with a fee.⁴³ In these scenarios, the friends and family members or the bondsman are accepting the risk if the defendant fails to appear in court.⁴⁴ If the defendant cannot afford to post bond, they will remain detained pre-trial.⁴⁵

Despite the ABA's requirement that monetary bail conditions should be imposed only when there is no other way to ensure a defendant's subsequent appearances,⁴⁶ monetary bail is imposed more often than the other options.⁴⁷ For example, in 2014, the court imposed monetary conditions of release on over half of Allegheny County arrestees.⁴⁸ Monetary bail conditions were imposed on seventy-nine percent of defendants charged with a felony and one-third

35. PA. R. CRIM. P. 528(A)(1)-(2), 523(A)(1)-(10).

36. *See id.* at R. 523(A)(1)-(10).

37. *See, e.g., infra* note 193 and accompanying text.

38. PA. R. CRIM. P. 523 cmt.

39. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 6.

40. *Id.*; PA. R. CRIM. P. 524(C)(3).

41. PA. R. CRIM. P. 524(C)(5), 528(C); CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 6.

42. Wiltz, *supra* note 4.

43. *See* 42 PA. CONS. STAT. § 5741 (2017).

44. *See* CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 6.

45. *Id.*

46. AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS: PRETRIAL RELEASE 3 (3d ed. 2007).

47. MARK A. NORDENBURG & FREDERICK W. THIEMAN, UNIV. OF PITTSBURGH INST. OF POLITICS, CRIMINAL JUSTICE IN THE 21ST CENTURY: ALLEGHENY COUNTY PRETRIAL DECISIONS 6 (2016).

48. *Id.*

of defendants charged with a misdemeanor.⁴⁹ Therefore, although judges have several options within Pennsylvania's bail statutes to determine pre-trial release criteria, the system is predominately monetary.

IV. PROBLEMS AND CRITICISMS OF A MONETARY BAIL SYSTEM

Pennsylvania's current monetary bail system relies on "wealth based" pre-trial detention.⁵⁰ For indigent individuals who are unable to post their bonds, the bail system, which is designed to protect defendants from unnecessary pre-trial detention, is precisely what keeps these individuals in jail.⁵¹ Despite the presumption of our criminal justice system—innocent until proven guilty—throughout the country there are 450,000 legally innocent individuals in jail awaiting trial simply because they cannot afford to post their monetary bail.⁵² Three-fifths of jail populations are defendants awaiting trial or plea resolution because they cannot afford even a low bail.⁵³ The problems with the monetary bail system go beyond injustice. The system undermines its own purpose and also has broader implications on our criminal justice system. Part A of this section will discuss the practical problems and the impact of those problems on the accused. Part B of this section will discuss how courts have addressed the problems with a monetary bail system. Part C of this section will review the existing literature commenting on both the problems of a monetary bail system and proposed solutions. Finally, Part D of this section will discuss how empirical studies have revealed the problems with Pennsylvania's monetary bail system.

A. *Practical Problems and the Impact of a Monetary Bail System*

i. *Monetary Bail Fails to Ensure Appearance in Court*

"Bail is supposed to make sure that you show up for court. How much money you have in your pocket shouldn't determine that."

49. *Id.*

50. *Challenging the Money Bail System*, CIV. RTS. CORPS, <http://www.civil-rightscorps.org/work/wealth-based-detention> (last visited Feb. 1, 2019).

51. *Planet Money*, *supra* note 1.

52. *Challenging the Money Bail System*, *supra* note 50.

53. Sarah Lazare, *Hundreds of Thousands Are Languishing in Jails Because They Can't Afford Bail Bonds: A National Movement is Building to End This*, JUST. POL'Y INST. (Dec. 22, 2016), <http://www.justicepolicy.org/news/11103>.

– *Leslie Cooper, Washington DC's Pre-trial Services Agency Deputy Director*⁵⁴

As mentioned earlier, the first purpose of bail in our criminal justice system is to ensure a defendant appears in court for trial.⁵⁵ Eric Sterling, Executive Director of the Criminal Justice Policy Foundation, confirms that there is a growing recognition that a monetary bail system does not necessarily ensure that defendants will appear in court.⁵⁶ Under the logic of the current system, a high bond *should* increase the chances that a defendant appears for trial as to not forfeit the money. Yet, results of the Pre-trial Justice Institute's study on unsecured bond show that a higher bail amount does not correlate with an increase in court appearances.⁵⁷ Additionally, results of a 2016 study entitled *The Heavy Costs of High Bail* analyzed the consequences of a money bail system in Philadelphia and Pittsburgh, the two largest cities in Pennsylvania, revealing that monetary bail has a negligible effect on appearance rates, if not *increasing* defendants' failures to appear.⁵⁸ In fact, individuals released on recognizance appear at the same rate as those with monetary bail conditions.⁵⁹

ii. Monetary Bail Increases Recidivism and Creates an Illusion of Public Safety

The second purpose of bail in our criminal justice system is to ensure the safety for the public.⁶⁰ Under the logic of the current system, bail protects the public by keeping those accused of crimes from committing a new crime while awaiting trial, and this consideration must indeed be contemplated pursuant to Pennsylvania's "Right to bail" statute.⁶¹ With a monetary bail system, however, money is the only factor separating pre-trial detainees from release.⁶² Yet the amount of money in a defendant's pocket certainly

54. Wiltz, *supra* note 4.

55. See *supra* note 5 and accompanying text.

56. Wiltz, *supra* note 4.

57. MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 14 (2013).

58. Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 472, 496 (2016).

59. JONES, *supra* note 57, at 22.

60. See *supra* note 6 and accompanying text.

61. See 42 PA. CONS. STAT. § 5701 (an individual is not bailable if "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community").

62. See generally PA. R. CRIM. P. 524(C)(5).

does not predict re-offense.⁶³ In fact, incarceration alone makes it more likely that an individual will commit another crime.⁶⁴ Defendants who are incarcerated before trial have higher rates of recidivism than those who were free awaiting trial.⁶⁵ When compared to similar offenders released before trial, low-risk offenders held longer than three days are fifty percent more likely to be re-arrested within two years.⁶⁶ According to the Arnold Foundation, an organization whose objective is to promote a fair criminal justice system, when a low-risk individual is incarcerated, even for less than twenty-four hours, he or she is more likely to commit a crime after that experience.⁶⁷ A Pennsylvania House Representative agrees that antiquated bail practices have provided no proof of keeping the public safe.⁶⁸

Furthermore, the nature of corrections fails low-risk individuals who have yet to be convicted of any crime.⁶⁹ Incarceration before trial may increase the chances of an individual's involvement with crime after release.⁷⁰ The default corrections route within our criminal justice system is institutionalization.⁷¹ Yet, according to John Wetzel, Secretary of Corrections for the Commonwealth of Pennsylvania, it is the least effective option.⁷² He confirms that "with low risk individuals, [the Department of Corrections] do[es] very badly. They're going to come out worse almost across the board."⁷³ When the criminal justice system forces those who will be better served outside of the criminal justice system into institutionalization based solely on their financial situation, it both fails the individual and undermines its purpose.

63. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 6.

64. *Criminal Injustice: Correcting a Corrections Department*, WESA (Sept. 19, 2017) (downloaded using iTunes).

65. Erika Eichelberger, *Study: Pretrial Detention Creates More Crime*, MOTHER JONES (Dec. 19, 2013), <https://www.motherjones.com/crime-justice/2013/12/pretrial-detention-repeat-offenders/>.

66. Jeffery Fraser, *No Money Down: Bail Reform Seeks to Cut Incarceration Rates*, PITT. Q. (2017), <https://pittsburghquarterly.com/pq-commerce/pq-region/item/1454-no-money-down.html>.

67. *Criminal Injustice: Correcting a Corrections Department*, *supra* note 64.

68. Memorandum from Representative Joanna E. McClinton to House of Representatives (Jan. 30, 2017, 2:13 PM), <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20170&cosponId=22597> [hereinafter Memo on H.B. 1092].

69. *Criminal Injustice: Correcting a Corrections Department*, *supra* note 64.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

iii. *Monetary Bail has Negative Economic Impacts on Already Indigent Defendants*

"The truth of the matter is a day in jail is too long if you don't need to be there. The consequences of being removed from your job, your home, your car, your family when you shouldn't be has a profound impact on that person, the jail population—everyone pays."

*– Elliot Howsie, Allegheny County Chief Public Defender*⁷⁴

Spending time in jail awaiting trial perpetuates the cycle of poverty for indigent defendants. When a defendant is bailable but must stay in jail awaiting trial, it is likely that he or she cannot afford to pay for release.⁷⁵ Because he or she is not released pre-trial, the individual may lose their job, their housing, or their government assistance while waiting in jail.⁷⁶ The defendant's lack of money—the very reason they remained in jail in the first place—is now made worse because he or she was awaiting trial in jail. Indeed, Jeanne Pearlman, Senior Vice President for Program and Policy at the Pittsburgh Foundation, confirms that "the system perpetuating the conditions that keep people in poverty . . . incarceration . . . is a cause of poverty and it is an effect of poverty at the same time."⁷⁷ These circumstances can also have an impact on a defendant's child custody determination and access to health care.⁷⁸ Furthermore, when a defendant is no longer able to support his or her family while incarcerated, it puts an economic and emotional strain on the family.⁷⁹ This may create a need for families to enroll in social welfare programs until the defendant is afforded a trial.⁸⁰

iv. *Monetary Bail Contributes to Our Country's Mass Incarceration Epidemic*

Despite accounting for less than five percent of the world's population, the United States houses twenty-five percent of the world's prisoners.⁸¹ The United States incarcerates 693 people for every 100,000 residents, which is higher than any other country in the

74. Fraser, *supra* note 66.

75. *All Things Considered: In New Jersey, Sweeping Reforms Deliver Existential Threat to Bail Bonds Industry*, NPR (July 6, 2017, 4:31 PM) (downloaded using iTunes).

76. Fraser, *supra* note 66.

77. *Id.*

78. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 7.

79. *Criminal Injustice: Correcting a Corrections Department*, *supra* note 64.

80. *Id.*

81. Memo on H.B. 1092, *supra* note 68.

world.⁸² Six out of ten adults in jails have not yet been convicted of a crime, despite our criminal justice system's presumption of innocence.⁸³ As a result, our jails and prisons are overpopulated. Pennsylvania is among the top ten states for the most overcrowded jails, housing 50,000 individuals despite having a capacity for only 47,000.⁸⁴ The majority of individuals in Pennsylvania's county jails are merely awaiting trial, having not yet been convicted of a crime.⁸⁵ In fact, only twenty percent of Allegheny County's jail population is actually serving a sentence.⁸⁶ In Philadelphia County, sixty-five percent of inmates are pre-trial.⁸⁷ Housing defendants before trial is expensive for taxpayers. For example, housing a single inmate for one day in Allegheny County jail costs taxpayers \$86.77.⁸⁸ Housing a pre-trial defendant in Philadelphia costs taxpayers \$120 a day.⁸⁹ As a result, incarcerating individuals yet to be convicted of a crime perpetuates the country's reliance on incarceration.

v. Monetary Bail Increases the Number of Guilty Pleas

Defendants who are incarcerated before trial are more likely to be convicted than those released before trial.⁹⁰ Defendants held in jail longer than three days are thirty percent more likely to be convicted or plead guilty, three times more likely to be sentenced to prison, and twice as likely to be sentenced for a *longer* period of incarceration.⁹¹ After spending time in jail, defendants are more likely to take a plea deal than spend more time in jail awaiting trial.⁹² This is especially true if defendants have already served a sentence that is long enough to satisfy the plea's requirements while awaiting trial, known as the time-served plea.⁹³ New Jersey Assistant Attorney General Elie Honig has suggested that the time-served plea is a common practice amongst prosecutors.⁹⁴ After a few months in jail, prosecutors might offer defendants awaiting trial a plea deal.⁹⁵ The defendants in these time-served plea deals

82. Fraser, *supra* note 66.

83. Wiltz, *supra* note 4.

84. Memo on H.B. 1092, *supra* note 68.

85. Fraser, *supra* note 66.

86. *Id.*

87. Memo on H.B. 1092, *supra* note 68.

88. Fraser, *supra* note 66.

89. Wiltz, *supra* note 4.

90. Fraser, *supra* note 66.

91. *Id.*

92. Wiltz, *supra* note 4.

93. Planet Money, *supra* note 1.

94. *Id.*

95. *Id.*

will have already served the requisite amount of time proposed by the prosecutor's deal.⁹⁶ If they take the plea, they can go home that day.⁹⁷ Honig acknowledged the practice as an easy way to obtain guilty pleas.⁹⁸ If the defendant takes this plea deal but did not actually commit the crime, the case is considered closed and law enforcement discontinues investigation.⁹⁹ Yet, the individual who actually committed the crime remains free, affecting public safety and exposing the public to potential risk of subsequent crimes by this individual.¹⁰⁰ Finally, if a defendant is not given a plea option and remains incarcerated until trial, he or she may not have the opportunity to gather the information needed to support a defense at trial.¹⁰¹

vi. Overall Impact of the Practical Problems

Taken together, pre-trial detention leads to long-term practical impacts on defendants, particularly indigent defendants who may be otherwise eligible for pre-trial release. Those problems reveal how the system undermines its own purpose of ensuring appearance in court and impacts the criminal justice system as a whole. The problems boil down to an over-reliance on monetary conditions of release and represent a call to action to the legislature. The legislature should respond with a restructured system that changes focus on monetary conditions of release and instead relies on more objective conditions of release that focus on risk of flight and community safety. The solution proposed in this article does precisely that, and suggests eliminating monetary conditions of release—combating these problems from the root.

B. Problems with the Bail System Identified by Courts

Courts have recognized that the bail system—particularly a monetary bail system—is not without problems and certain bail schemes may in fact raise constitutional issues. At the heart of the bail system is the practice of pre-trial detention in and of itself—a practice that is wholly constitutional.¹⁰² The United States Su-

96. *Id.*

97. *Id.*

98. *Id.*

99. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 7.

100. *Id.*

101. *Id.* at 4.

102. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

preme Court in *United States v. Salerno* held that there is no absolute right to bail because while an individual has a strong interest in liberty, the government's interest in preventing crime by arrestees is both legitimate and compelling.¹⁰³ Therefore, while *Salerno* certainly recognizes that a bail system inherently comes with the problem of liberty infringement, pre-trial detention alone is not a problem that the Supreme Court has recognized as unconstitutional or detrimental.

Courts, however, have invalidated the practice of setting an unreasonably high bail, to the point of practically denying bail to a defendant, as a violation of the Eighth Amendment.¹⁰⁴ In *Stack v. Boyle*, the United States Supreme Court recognized two problems with pre-trial detention: first, that freedom before conviction helps the defendant prepare a defense, and second, that pre-trial detention could be an infliction of punishment before conviction.¹⁰⁵ The Court in *Stack* noted that the purpose of bail is to assure appearance at trial and therefore the defendant's bail amount must be fixed individually.¹⁰⁶ Similarly, in *Carlson v. Landon*, the United States Supreme Court found that the use of discretion in imposing pre-trial detention is not founded on any one fact or set of facts; rather, it is proper to consider all of the attending circumstances.¹⁰⁷

Moreover, courts have found that high bail amounts pose particular problems for indigent defendants. In *Jones v. City of Clanton*, the United States District Court for the Middle District of Alabama held that pre-trial detention due to the defendant's inability to pay for release violates the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁸ There, the city used a generic bail schedule to determine the defendant's bond amount and there was no option for release through recognizance or an unsecured bond.¹⁰⁹ The court found that bail schedules without any individualized hearing regarding the person's indigence and need for bail alternatives are unconstitutional and violate the Due Process Clause.¹¹⁰ The court noted that bail schedules imposing unnecessary pre-trial detention

103. *Id.* at 748-49.

104. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

105. *Id.* at 4.

106. *Id.* at 5.

107. *Carlson v. Landon*, 342 U.S. 524, 532-33 (1951).

108. *Jones v. City of Clanton*, NO. 2:15cv34-MHT, 2015 U.S. Dist. LEXIS 121879, at *7 (M.D. Ala. Sept. 14, 2015).

109. *Id.* at *3.

110. *Id.* at *7.

can detrimentally impact individuals, resulting in loss of a job, family life disruption, and idleness.¹¹¹ Such pre-trial detention also impedes preparation of an individual's defense, induces guilty pleas, burdens taxpayers, and possibly results in pre-trial detention that exceeds the expected sentence.¹¹² Similarly, in *State v. Blake*, the Supreme Court of Alabama held that a bail system based solely on some form of monetary bail without options for release on recognizance in appropriate circumstances is unconstitutional.¹¹³

Read together, these cases have addressed the problems associated with a bail system. Specifically, in the realm of constitutionality, courts have recognized that an individual's liberty is certainly infringed with bail practices, and understanding the impact that a particular bail practice has on an individual's liberty interest is important in determining constitutionality. Courts have also addressed the importance of having alternatives to monetary bail and the vulnerability of indigent defendants with a monetary bail system. Courts have noted the detrimental impact that deprivation of liberty can have on defendants, particularly when it is appropriate to offer defendants alternatives to monetary bail. Finally, courts have underscored the problem of using bail as a punitive tactic rather than an assurance for appearance.

In determining the constitutionality of bail practices, the judiciary has outlined the problems associated with current bail systems. State legislatures should respond in kind to address these problems. Importantly, despite the abundance of case law that signals the unconstitutionality of setting high bail to prevent defendants from being released pre-trial, this practice has increased with current monetary bail systems.¹¹⁴ Therefore, a gap still exists between the problems outlined by the courts and the legislature's response to these problems. After reviewing how other jurisdictions and Pennsylvania have responded, this article proposes a solution for Pennsylvania that combats the problems courts have identified with a monetary bail system, particularly for indigent defendants.

C. *Literature and Commentary Related to a Monetary Bail System*

Existing literature related to monetary bail systems outlines several problems associated with the system and proposes solutions to

111. *Id.* at *8.

112. *Id.* at *8-9.

113. *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994).

114. Goff, *supra* note 13, at 889.

address these problems. Authors, however, differ in their proposed solutions.

Kyle Rohrer's *Bail Reform Act* discussed the states' failure to eliminate surety and cash bonds from their bail systems.¹¹⁵ Rohrer specifically identified the problems with cash bail systems: jail overcrowding, the disproportionate detention of indigent defendants pre-trial, and defendants' inability to assist in defense preparation when detained pre-trial, leading to more wrongful convictions.¹¹⁶ He noted that the federal system utilizes pre-trial services that encourage non-financial release conditions over monetary bail conditions, while states still primarily use cash bail systems to determine whether a defendant will be detained pre-trial.¹¹⁷ Rohrer argued that states move away from a cash bail system through pre-trial services systems that employ risk-assessment tools to promote defendants' pre-trial release.¹¹⁸

A Symposium Note on the *Wasteful Enterprise of America's Bail System* similarly suggested that a wealth-based bail system inhibits a defendant's ability to assist in their defense, and also increases the likelihood of a guilty plea.¹¹⁹ It explained that monetary bail systems have a disproportionate effect on the indigent; an illusory impact on justice; a negative impact on the defendant's family, education, housing, employment, connection to the community, and access to governmental services; an increase to guilty pleas; an increase to recidivism; and a negative impact on a defendant's ability to establish a defense.¹²⁰ Precisely because pre-trial incarceration is expensive to taxpayers and hurts a defendant's long term productivity, community well being, and family unity,¹²¹ the Note called for policy reform.¹²² It discussed the implementation of risk-assessment tools in New York City and Washington, D.C., encouraging pre-trial release pending trial and combating the problems associated with wealth-based pre-trial detention systems.¹²³ Unlike Rohrer's article, however, this Note argued that determining bail decisions based on criteria such as socioeconomic background, neigh-

115. Kyle Rohrer, Comment, *Why Has the Bail Reform Act Not Been Adopted by the State Systems?*, 95 OR. L. REV. 517, 519 (2017).

116. *Id.* at 521-22.

117. *Id.* at 524-25.

118. *Id.* at 538.

119. Goff, *supra* note 13, at 881-82.

120. *Id.* at 896-901.

121. *Id.* at 882.

122. *Id.* at 887-88.

123. *Id.* at 893-95.

borhood, or education level only perpetuate the monetary bail system injustices.¹²⁴ The Note called for state legislatures to reform bail policies that permit pre-trial detention only when “no reasonable set of conditions can allay concerns of failure-to-appear or community safety”¹²⁵ and that any bail decision should not be determined solely through assessing an individual’s risk to public safety or flight risk.¹²⁶

In sum, existing literature surrounding a monetary bail system notes similar problems associated with a monetary bail system outlined previously in Part A and Part B of this section. As this article will also suggest, the existing literature calls for reform by the legislatures. The difference in opinion surrounding the appropriate solution reveals that there may be *several* appropriate reforms to the bail system. Additionally, perhaps jurisdictions must weigh the benefits and drawbacks of reform tactics—small steps versus sweeping reform. This article proposes a solution that adopts Rohrer’s proposition that risk-assessment tools are appropriate ways to determine pre-trial detention, while not contravening the Note’s assertion that risk-assessment tools can perpetuate the injustices of a monetary bail system. The proposed solution relies on a risk-assessment tool that uses objective factors that assess a defendant’s risk of flight and threat to the community—not criteria like education or socioeconomic status. In fact, the proposed solution for Pennsylvania goes beyond *only* using pre-trial risk-assessment tools in making bail decisions—it calls for completely eliminating the use of cash as a method of release. Importantly, this literature review reveals that in order to find the appropriate solution, jurisdictions must rely on the data of the current system in creating reform.¹²⁷ The data, along with the current literature outlined in this section, can serve as a foundation for reform to Pennsylvania’s bail system.

D. Empirical Studies that Reveal Problems of a Monetary Bail System

Empirical studies reveal the arbitrariness of a monetary bail system because magisterial district judges, as decision makers, can

124. *Id.* at 887.

125. *Id.* at 888.

126. *Id.* at 911.

127. For example, recall that in 2014 Allegheny County judges predominately imposed monetary bail conditions. *See supra* note 48 and accompanying text. Furthermore, empirical data regarding Pennsylvania’s current monetary bail system that can assist in finding the appropriate solution are outlined in part D of this section.

bring biases into their bail decisions.¹²⁸ That is not to say that all bail decisions are grossly unfounded; however, it does create a system where a bit of luck comes into play. Outcomes, of course, depend on which judge is assigned the case. The 2016 *Heavy Costs of High Bail* study of monetary bail implications in Philadelphia and Pittsburgh showed that “[a]ll else being equal, some judges assess money bail frequently, while others do so sparingly.”¹²⁹ Furthermore, the imposition of money bail has a *causal* impact on guilty pleas and recidivism.¹³⁰ The study labeled the judges who frequently imposed money bail conditions as “severe,” and found that defendants who were assigned one of these more “severe” judges were more likely to be assigned money bail for reasons other than the defendant’s personal characteristics or the underlying facts of the case.¹³¹ Similarly-situated defendants may receive different bail assessments based on the “severity” of their assigned judge.¹³² In these two jurisdictions, judge assignment is essentially random.¹³³ Philadelphia has a 24-hour bail court in a centralized location where judges rotate through hearing cases.¹³⁴ Pittsburgh judges preside over bail hearings for the arrests that occur within that magisterial district judge’s jurisdiction, but some defendants may be assigned another magisterial district judge on nights or weekends.¹³⁵ Therefore, the decision of whether to impose a monetary bail condition—the decision that has the power to predict the outcome of the defendant’s entire case—is based on essentially random magistrate assignment and granted extreme judicial discretion.¹³⁶ Indeed, release before trial is the single most important decision made in the criminal justice system, because this first decision impacts each decision that follows, including length of incarceration and likelihood of recidivism.¹³⁷ The criminal justice system is not perfect, having been “[c]reated by human beings . . . [and] at the mercy of human error, usually made in good faith, although occasionally with ill intent.”¹³⁸ What we can expect, however, is that

128. *Criminal Injustice: Correcting a Corrections Department*, *supra* note 64.

129. Gupta et al., *supra* note 58, at 472.

130. *Id.* at 487, 495.

131. *Id.* at 472.

132. *Id.* at 481.

133. *Id.*

134. *Id.* at 477.

135. *Id.* at 478.

136. *Id.* at 472.

137. Press Release, Laura & John Arnold Found., More than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial (June 26, 2015), <https://www.courts.wa.gov/subsite/mjc/docs/ArnoldFoundation.pdf>.

138. Greg Johnson, *A More Perfect Criminal Justice System*, PENN TODAY (Dec. 18, 2014), <https://penntoday.upenn.edu/2014-12-18/features/more-perfect-criminal-justice-system>.

the front-end decisions be based on objective criteria, rather than subjectivity.

Overall, the empirical data reveal that current monetary bail practices in Pennsylvania are *causing* the practical problems and negative impacts outlined throughout this section. The legislature must respond with appropriate reforms in order to address these problems. This article ultimately proposes a solution for Pennsylvania that will combat the problems and reduce the arbitrary imposition of bail by completely eliminating the use of cash as a method of release. This solution eliminates a defendant's economic status as a factor determining release, and instead proposes using risk-assessment tools to aid in pre-trial detention decisions.

V. HOW OTHER JURISDICTIONS HAVE ADDRESSED THE PROBLEMS WITH A MONETARY BAIL SYSTEM

"Solving this problem is really the lowest hanging fruit on the criminal justice tree. The solution is to move from an offense-based, money-based decision-making system to one that is risk-based. We know what to do. We know that it works. We know that we see immediate results."

– Cherise Fanno Burdeen, Pretrial Justice Institute CEO¹³⁹

Fortunately, society has recognized the need to move away from a monetary bail system. Many jurisdictions have already taken action by way of reform to address the problems associated with a monetary bail system. This section explores some of those jurisdictions. These changes can serve as a model for reforming Pennsylvania's monetary bail system.

A. *The Federal Bail System*

In 1984, Congress passed the federal Bail Reform Act.¹⁴⁰ In the federal system, there is no right to bail—arrestees may be detained pre-trial if there is a finding that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.”¹⁴¹ The prosecutor bears the burden of showing, through a specific motion and evidence at a hearing, that a defendant should be detained

139. Fraser, *supra* note 66.

140. Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (1984).

141. *Id.* § 3142(e)(1).

pre-trial.¹⁴² Generally, in ordering pre-trial detention, there is a presumption of release;¹⁴³ however, with some specific crimes, there is a rebuttable presumption that no condition or combination of conditions will assure appearance as required for the safety of the community.¹⁴⁴ In *United States v. Salerno*,¹⁴⁵ the United States Supreme Court held that detaining a defendant without bail does not violate the Eighth Amendment because there is no absolute right to bail.¹⁴⁶ However, under the federal system, if a judge orders that a person be released upon a condition or conditions pending trial, the judge must choose the least restrictive combination of conditions to assure appearance and community safety.¹⁴⁷ Furthermore, if a monetary condition is imposed, it can only be by means of an unsecured bond—that is, the defendant or the defendant’s surety agrees only to forfeit money or property for failing to appear and is not required to pay any money for his release.¹⁴⁸ The federal bail system has struck a balance between the presumption of release and the presumption of detention, while focusing on appearance and safety, rather than money, in its release decisions.

B. Washington, D.C.

Washington, D.C. was the first jurisdiction to eliminate a monetary bail system.¹⁴⁹ Within the jurisdiction, eighty-eight percent of defendants are released based on non-financial conditions.¹⁵⁰ The city has a pre-trial services program that determines the “risk” of a defendant based on their criminal history, potential risk of flight, risk to community safety, and if the defendant has substance abuse or mental health needs.¹⁵¹ Low-risk defendants are released, usually without monetary conditions.¹⁵² Examples of non-monetary

142. *Id.* § 3142(f).

143. *See id.* § 3142(b).

144. *Id.* § 3142(e)(3) (setting forth circumstances in which there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure safety and appearance which include: an offense under the Controlled Substance Act for which the maximum term of imprisonment is ten years; the use of a firearm during a crime of violence or drug trafficking crime; conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; acts of terrorism transcending national boundaries; federal crimes of terrorism; peonage; and some crimes involving a minor).

145. *United States v. Salerno*, 481 U.S. 739 (1987).

146. *Id.* at 753.

147. 18 U.S.C. § 3142(c)(1)(B).

148. *Id.* § 3142(b), (c)(1)(B)(xi)-(xii).

149. *Criminal Injustice: How Bail Traps the Poor*, WESA (Aug. 23, 2016) (downloaded using iTunes).

150. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 15.

151. Wiltz, *supra* note 4.

152. *Id.*

conditions include in-person or over-the-phone reporting to pre-trial agencies, electronic monitoring, or drug testing.¹⁵³ Ninety percent of the defendants released without monetary bail return to court and remain arrest-free as they await trial.¹⁵⁴

While Washington, D.C.'s system is known as a "model" bail system,¹⁵⁵ the uniqueness of the Washington, D.C. jurisdiction cannot go without mention.¹⁵⁶ Such uniqueness may be a contributing factor to the program's success: the federal government funds the pre-trial services agency, the District's Public Defender Office is high-functioning and can handle representing indigent defendants at pre-trial detention hearings, and courts operate out of a single courthouse.¹⁵⁷ Of course, these services are also expensive—the agency's budget was \$62.4 million in 2016.¹⁵⁸ Nonetheless, these positive outcomes cannot be attributed solely to its uniqueness; employing similar methods in other jurisdictions can yield similarly positive outcomes, even if the positive outcomes are not as powerful as in Washington, D.C.

C. *New Jersey*

New Jersey has taken the most extreme stance on reforming and eliminating its monetary bail system.¹⁵⁹ Like other jurisdictions, New Jersey observed that the monetary bail system was failing its criminal defendants. Forty percent of New Jersey inmates were incarcerated solely because they could not afford bail, and were waiting an average of 314 days for trial.¹⁶⁰ Twelve percent of those in jail awaiting trial could not afford their bail bonds of less than two thousand dollars.¹⁶¹

The road to New Jersey's bail reform began with Chief Justice of the New Jersey Supreme Court Stuart Rabner calling for efforts to fix the bail system.¹⁶² As in Pennsylvania,¹⁶³ the New Jersey Constitution used to contain a right to bail provision, which allowed all

153. *Id.*

154. *Id.*

155. *Id.*

156. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 15.

157. *Id.*

158. Wiltz, *supra* note 4.

159. *Morning Edition: New Jersey Banking on Shift from Bail Money to Risk Assessment*, NPR (Dec. 27, 2016) (downloaded using iTunes).

160. *Planet Money*, *supra* note 1.

161. *Morning Edition*, *supra* note 159.

162. *Planet Money*, *supra* note 1.

163. PA. CONST. art. I, § 14.

persons to be “bailable by sufficient sureties, except for capital offenses.”¹⁶⁴ In other words, defendants were entitled to bail—there were no conditions in which a defendant could be detained pre-trial without option for release.¹⁶⁵

On November 4, 2014, however, by a vote of sixty-two percent to thirty-eight percent, New Jersey citizens voted by referendum to amend the constitution through the New Jersey Pre-trial Detention Amendment.¹⁶⁶ Interestingly, the proposed amendment was phrased on the ballot to be relatively tough-on-crime, despite the fact that the non-monetary bail system would not generally be perceived as a tough-on-crime initiative. For example, a portion of the ballot read that “[t]he change to the Constitution would mean that a court could order that a person remain in jail prior to trial, even without a chance for the person to post bail, in some situations.”¹⁶⁷ It listed examples of when a court may decide that a defendant should be detained before trial: concerns that a defendant would not appear in court; concerns that the defendant is a threat to safety of another person or the community; or concerns the defendant might obstruct the criminal justice process.¹⁶⁸ Notably, these changes are analogous to the practices in the federal system, where a defendant may be detained before trial and denied bail altogether.¹⁶⁹

Specifically, the amendment authorized the New Jersey legislature to draft legislation regarding pre-trial release and detention and delayed the amendment’s effective date to January 1, 2017, to allow the legislature to establish such laws.¹⁷⁰ This opened the door to the adoption of the New Jersey Bail Reform and Speedy Trial Act.¹⁷¹ The legislation completely eliminated bail for non-violent defendants and put initiatives in place to monitor defendants who

164. N.J. CONST. art. I, para. 11 (amended 2014).

165. *Planet Money*, *supra* note 1.

166. *Official General Election Results: Public Question NO. 1*, N.J. DEP’T ST. (Dec. 2, 2014), <https://nj.gov/state/elections/2014-results/2014-official-general-public-question-1.pdf>.

167. S. Con. Res. 128, 216th Leg. (N.J. 2014). The amendment removed the language “bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great” and added the language “[p]retrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.” *Id.*

168. *Id.*

169. 18 U.S.C. § 3142(e)(1) (2018).

170. S. Con. Res. 128, 216th Leg. (N.J. 2014).

171. N.J. STAT. ANN. § 2A:162-15 (2017).

had been released.¹⁷² The purpose of the legislation was to “primarily [rely] upon pretrial release by non-monetary means” while protecting community safety, assuring appearance in court, and preventing the defendant from obstructing justice.¹⁷³ The legislation and the constitutional amendment therefore have similar purposes. While there is a presumption of release, a prosecutor may move to order pre-trial detention, and such detention is authorized when, by clear and convincing evidence, no condition or combination of conditions can effectuate the purpose of the statute.¹⁷⁴ Interestingly, the statute does contain a provision that allows monetary bail to be set only when no condition of release will reasonably assure appearance in court.¹⁷⁵

Similar to the pre-trial services programs enjoyed by Washington, D.C. defendants,¹⁷⁶ New Jersey adopted the Public Safety Assessment (“PSA”), developed by the Laura and John Arnold Foundation, to determine whether defendants should be released or detained before trial.¹⁷⁷ Rather than imposing arbitrary bail amounts, the PSA’s goal is to help judges make decisions regarding a defendant’s pre-trial detention based on evidence of a defendant’s potential risk.¹⁷⁸ The assessment, based on 1.5 million cases from 300 U.S. jurisdictions, gives each defendant a score from one to six that represents the likelihood that a particular defendant will commit a new crime while released awaiting trial or will fail to appear for a future court appearance.¹⁷⁹ The lower the score, the more compelling it is that a defendant should be released pending trial.¹⁸⁰ The PSA uses nine factors to produce its score:

- Whether the current offense is a violent one;
- Whether the defendant has a pending charge at the time of the offense;
- Whether the defendant has a prior misdemeanor conviction;
- Whether the defendant has a prior felony conviction;

172. *PBS News Hour: New Jersey Eliminates Most Cash Bail, Leads Nation in Reforms*, WQED (July 22, 2017, 3:26 PM), <https://www.pbs.org/newshour/show/new-jersey-eliminates-cash-bail-leads-nation-reforms>.

173. N.J. STAT. ANN. § 2A:162-15.

174. *See id.*

175. *Id.*

176. *See supra* note 151 and accompanying text.

177. Press Release, *supra* note 137; *see also* LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 1 (2016), <https://craftme-diabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf>.

178. Press Release, *supra* note 137.

179. LAURA & JOHN ARNOLD FOUND., *supra* note 177, at 2-3.

180. *PBS News Hour*, *supra* note 172.

- Whether the defendant has a prior conviction for a violent crime;
- Whether the defendant failed to appear pre-trial within the past two years, and, if so, how many times;
- Whether the defendant failed to appear pre-trial before the past two years;
- Whether the defendant was previously sentenced to incarceration; and
- The defendant's age at the time of arrest.¹⁸¹

Notably, the PSA does not consider discriminatory factors such as race, ethnicity, or geography.¹⁸² Additionally, as a safeguard, the PSA does not replace a judge's discretion in determining whether a defendant should be detained or released pending trial.¹⁸³ For example, a defendant may have a high PSA score but a judge may take into consideration that the defendant is working or supporting children to justify release.¹⁸⁴

Since the implementation of the New Jersey Bail Reform and Speedy Trial Act, New Jersey has monitored released defendants pre-trial through routine check-ins to pre-trial services and electronic monitoring.¹⁸⁵ Defendants now get call, text, or email reminders about their court dates.¹⁸⁶ As a result, New Jersey has seen a nineteen-percent decrease in its jail population.¹⁸⁷ This sweeping reform has likewise altered the rhetoric used in the New Jersey criminal courts. Formerly known as a "bail hearing," the hearing that determines whether a defendant should be detained pre-trial is now known as a "detention hearing."¹⁸⁸

The new system is not immune to problems, however. In May 2017, the state needed to change its PSA algorithm to recommend detention *automatically* for defendants who re-offended while on release.¹⁸⁹ Some police officers opposed the reform, citing anecdotal evidence that they are re-arresting defendants only days from the defendants' release from a prior arrest.¹⁹⁰ Not surprisingly, the bail bond industry has suffered as a result of the new reforms and the largest bail bond company in New Jersey is now out of business.¹⁹¹

181. LAURA & JOHN ARNOLD FOUND., *supra* note 177, at 2.

182. *See id.*

183. *Id.*

184. *PBS News Hour*, *supra* note 172.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *All Things Considered*, *supra* note 75.

As a leader in radical bail reform, New Jersey has certainly needed to work through some roadblocks; nonetheless, jurisdictions that follow in the footsteps of New Jersey can learn from any obstacles that New Jersey has overcome and address them proactively.

D. Lessons Learned

Monetary bail is losing favor, and jurisdictions have responded accordingly. Taken together, jurisdictions' responses favor pre-trial release. In these jurisdictions, bail decisions focus on community safety and ensuring appearance. Furthermore, jurisdictions have successfully transitioned to bail systems that essentially eliminate monetary bail conditions. Using the actions of these jurisdictions as a foundation, along with empirical data from Pennsylvania that reveal the arbitrariness of bail decisions, this article proposes an objective bail system in Pennsylvania that focuses on keeping communities safe, assuring defendants' appearances, and protecting indigent defendants from the arbitrariness of monetary bail conditions.

VI. PENNSYLVANIA HAS TAKEN STEPS IN THE RIGHT DIRECTION

Pennsylvania has taken steps to respond to the problems associated with a monetary bail system in two ways. First, as of 2015, thirty-seven of the sixty-seven counties throughout Pennsylvania have implemented pre-trial services programs, and twelve of those counties use a risk-assessment tool.¹⁹² Allegheny County, for example, has adopted the Arnold Foundation's PSA—the same PSA implemented throughout New Jersey.¹⁹³ Second, Pennsylvania's General Assembly sought House Bill 1092, currently pending, seeks to implement these pre-trial services and risk assessment tools into counties throughout the Commonwealth with House Bill 1092.¹⁹⁴

First, Allegheny County's pre-trial services program reflects the Commonwealth's recognition that the current bail system is arbitrary and unjust. Allegheny County acknowledges that bail amounts were arbitrary before 2007.¹⁹⁵ As a precaution, bail amounts were typically set subjectively high.¹⁹⁶ After criticisms of

192. CARL REYNOLDS ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., JUSTICE REINVESTMENT IN PENNSYLVANIA 21 (2016).

193. Press Release, *supra* note 137.

194. H.B. 1092, 201st Gen. Assemb., Reg. Sess. (Pa. 2017).

195. BRUCE BARRON, ALLEGHENY CTY. DEP'T OF HUMAN SERVS., PRETRIAL DECISION MAKING: HOW A MODEL PRETRIAL SERVICES PROGRAM CHANGED ALLEGHENY COUNTY'S CRIMINAL JUSTICE SYSTEM 2 (2014).

196. *Id.*

Allegheny County's previous pre-trial practices, Allegheny County Pre-trial Services was created in 2007.¹⁹⁷ Part of Allegheny County's Pre-trial Services is a Bail Investigation Unit, designed to combat high bail amounts and "get it right the first time."¹⁹⁸ The Bail Investigation Unit, located in the Allegheny County jail, interviews defendants face to face, verifies the information provided by the defendant, and identifies the defendants who are eligible for bail.¹⁹⁹ The Bail Investigation Unit then makes pre-trial detention recommendations based on the defendant's risk level using the Arnold Foundation's PSA.²⁰⁰ The PSA helps provide judges with any background information necessary to determine appropriate bail amounts.²⁰¹

The program also has an alternative to establishing a monetary bail amount. Defendants can be granted release with conditions: in-person and over the phone reporting requirements; electronic monitoring; continued residence at a particular address; or avoiding contact with an alleged victim.²⁰² Pre-trial services staff monitors defendants' fulfillment of their conditions upon release.²⁰³ Since the implementation of its pre-trial services programing, Allegheny County's recidivism rate is down and court appearances are up.²⁰⁴ As of November 2016, eighty percent of defendants appeared at all of their hearings, seventy-nine percent of pre-trial defendants were not re-arrested while awaiting trial, and sixty-five percent of defendants were not charged with a new offense.²⁰⁵

Second, because Pennsylvania introduced legislation to implement pre-trial services and risk-assessment tools throughout the Commonwealth,²⁰⁶ the Pennsylvania General Assembly has acknowledged the importance of moving away from an arbitrary bail system. Primarily sponsored by Representative Joanna E. McClinton, the purpose of House Bill 1092 was to promote safety, produce more effective outcomes, provide courts with fact-driven information to make bond decisions, and prevent unnecessary pre-

197. *Id.* at 3.

198. *Id.* at 4.

199. *Bail Investigative Unit*, FIFTH JUD. DISTRICT PA., https://www.alleghe-nycourts.us/criminal/pretrial_services/bail_services/biu.aspx (last visited Feb. 2, 2019).

200. BARRON, *supra* note 195, at 4; Press Release, *supra* note 137.

201. Fraser, *supra* note 66.

202. BARRON, *supra* note 195, at 4-5.

203. *Id.* Since 2007, approximately three thousand individuals in Allegheny County are under pre-trial supervision during a given time. *Id.*

204. *Id.*

205. NORDENBURG & THIEMAN, *supra* note 47, at 4.

206. H.B. 1092, 201st Gen. Assemb., Reg. Sess. (Pa. 2017).

trial detention.²⁰⁷ The bill outlined the responsibilities of each county's pre-trial services programs, which include the implementation of a risk-assessment tool, supervision of released defendants, and reminding defendants of their court dates.²⁰⁸ The bill still allowed judges to impose a monetary bail condition.²⁰⁹ On April 7, 2017, the bill was referred to the judiciary committee,²¹⁰ but it failed.²¹¹

VII. PENNSYLVANIA NEEDS MORE RADICAL CHANGE

Pennsylvania has taken steps in the right direction to address the problems associated with the monetary bail system. Its actions, however, are simply not radical enough to combat the gross injustices and arbitrariness of the current monetary bail system. Certainly, Allegheny County has seen positive results in its implementation of the pre-trial services program.²¹² The Pennsylvania General Assembly, by drafting House Bill 1092, recognized the need for these types of programs in counties as well. But because imposing monetary bail conditions remain an option, however, glaring problems still exist with the steps, albeit in the right direction, that Pennsylvania has implemented so far. First, the pre-trial services and risk-assessment tools can simply be used to perpetuate a cash bail system. Second, results from the *Heavy Costs of High Bail* study in Pittsburgh and Philadelphia, two areas that were using risk-assessment tools during that time, reveal there is still wide judicial discretion in the implementation of monetary bail conditions.²¹³ Finally, magisterial judges are still influenced by their communities and have no obligation to follow pre-trial services' recommendations.²¹⁴ Each of these problems will be addressed in turn.

First, the pre-trial services and risk-assessment tools can simply be used to perpetuate, rather than eliminate, a cash bail system, because monetary bail is still available as a condition of a defendant's release. In Allegheny County, for example, a county that uses

207. *Id.* § 102.

208. *Id.* § 301(c).

209. *Id.* § 501(c)(5).

210. *Bill Information—History, House Bill 1092; Regular Session 2017-2018*, PA GEN. ASSEMBLY, https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2017&sind=0&body=H&type=B&bn=1092 (last visited Feb. 2, 2019).

211. *2017 Legislative Outlook H.B. 1092*, LEXISNEXIS, <https://advance.lexis.com/> (navigate from home page to legislative materials, bill tracking, Pennsylvania, then search 2017 HB 1092, legislative outlook will be the first result).

212. See *supra* notes 204-05 and accompanying text.

213. Gupta et al., *supra* note 58, at 472.

214. Fraser, *supra* note 66.

the Arnold Foundation's PSA, judges may still impose monetary bail as a condition of release.²¹⁵ In 2014, seven years after Allegheny County implemented its pre-trial services program, over half of Allegheny County arrestees were given monetary conditions of release, and monetary bail conditions were exercised over seventy-nine percent of defendants charged with a felony and one-third of defendants charged with a misdemeanor.²¹⁶ Therefore, because monetary conditions are implemented so frequently, the risk-assessment tools are simply being used by judges to decide whether to impose monetary bail conditions *at all*, not decreasing the frequency of monetary bail impositions. The risk-assessment tool is only solving one flaw of the monetary bail system, namely arbitrariness, rather than solving the larger scope of intertwined problems.

Second, as the results of the 2016 study made clear, despite both counties' use of an empirical risk-assessment tool, judges' impositions of bail amounts—or their decision to impose monetary bail at all—vary considerably among similarly situated defendants.²¹⁷ These results revealed that, despite the assessment's push to standardize judicial decisions, a huge variation exists in outcomes for similar defendants.²¹⁸ The study acknowledged that the results may have external validity outside of the precise jurisdictions examined;²¹⁹ therefore, this variation in defendants' outcomes will likely occur in other counties throughout Pennsylvania should other counties implement pre-trial services programs. These results reveal that the problems associated with the monetary bail system—even arbitrariness—will not be resolved through the use of pre-trial services programs alone.

Finally, magisterial district judges are still influenced by their communities and have no obligation to follow pre-trial services' recommendations. Magisterial district judges are elected officials, who have a duty to represent the communities that elected them.²²⁰ Judges may exercise discretion in determining whether to follow the recommendations of the pre-trial risk assessments.²²¹ Some judges may take community influence, and the possibility of reelection, into consideration when making pre-trial detention decisions and setting monetary bail amounts.²²² Indeed, Allegheny County

215. See PA. R. CRIM. P. 524(C)(5); Press Release, *supra* note 137.

216. NORDENBURG & THIEMAN, *supra* note 47, at 6.

217. Gupta et al., *supra* note 58, at 472-73.

218. *Id.*

219. *Id.* at 486.

220. Fraser, *supra* note 66.

221. *Id.*

222. *Id.*

magistrates follow the Allegheny County Pre-trial Services' bond recommendations only sixty-three percent of the time.²²³ Note, again, that these are *bond* recommendations coming from Allegheny County Pre-trial Services: a recommendation for a particular cash bail amount, not a recommendation for whether or not to detain a defendant pre-trial.²²⁴ The current use of pre-trial assessments, while a step in the right direction, are merely perpetuating a monetary bail system rather than eliminating it.

Furthermore, anecdotal evidence suggests that, if monetary bail remains an option, magisterial judges may use the assessment as reason to set *higher* bail. For example, Richard King, magisterial district judge for the district that includes the Pittsburgh neighborhoods of Mt. Oliver, Carrick, and Allentown, asserts that the risk assessment provides more insight into defendants' situations.²²⁵ But, he is not using the pre-trial assessment's recommendation.²²⁶ Mirroring the war-on-drugs mentality, King does not always agree with the assessment's recommendation for drug offenses, because "[t]here are more heroin deaths than homicides. Why should [heroin dealers] not be [considered] a danger to the community?"²²⁷

Therefore, despite taking a step in the right direction, implementation of pre-trial services programs in more counties throughout Pennsylvania is not enough. Current data supports this assertion because, despite the use of pre-trial services programs in some counties, the problems associated with a monetary bail system are still perpetuated.²²⁸ This article suggests that in order to combat the full scope of the problems, Pennsylvania must eliminate—completely—its monetary bail system. In order to determine whether this is an appropriate solution, the legislature could solicit data that compares defendants' outcomes in counties where judges frequently or rarely impose monetary bail conditions. The legislature could also solicit a method to test defendants' outcomes when monetary bail conditions are imposed. However, the best way to test the solution for Pennsylvania's monetary bail system is to look at outcomes in other jurisdictions. Given the positive outcomes from jurisdictions that no longer impose monetary bail conditions, like Washington, D.C. and New Jersey, this article proposes a more radical solution that completely eliminates the imposition of monetary

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. See *supra* notes 217-18 and accompanying text.

bail conditions. It is likely that the best way to test this solution is to implement the reform and use New Jersey as a guide—embracing New Jersey’s positive outcomes and working proactively to avoid any of New Jersey’s setbacks.

VIII. PROPOSED SOLUTION TO PENNSYLVANIA’S MONETARY BAIL SYSTEM

Pennsylvania should amend its Constitution to eliminate the Right to Bail provision. It should also afford courts the authority to detain defendants *without* an option of bail, and contemporaneously implement legislation that effectively eliminates monetary bail conditions and introduces a risk-based approach that favors conditional release of defendants.

Amending the Pennsylvania Constitution requires the Pennsylvania legislature to propose an amendment to be approved by referendum in the general election.²²⁹ The constitutional amendment for the proposed solution would require citizens to eliminate the Right to Bail provision of the Pennsylvania Constitution that protects defendants’ right to be released pre-trial. This right is afforded to the defendant for “sufficient sureties” unless the defendant’s alleged crime is a capital offense for which the maximum sentence is life imprisonment or if no condition other than imprisonment will assure the safety to the community.²³⁰ Eliminating Pennsylvania’s Constitution’s Right to Bail provision would eliminate a defendant’s *right* to pre-trial release and will allow judges to detain defendants without option for release, regardless of the underlying crime. As in the federal system, defendants will not enjoy an absolute right to bail.²³¹ Finding that a defendant may be detained without bail does not violate the Eighth Amendment because the Eighth Amendment does not afford an absolute right to bail,²³² so this proposed amendment to the Pennsylvania Constitution would not violate the United States Constitution.

While this type of constitutional amendment may seem counter-intuitive to an article that, admittedly, has advocated for a *decrease* in pre-trial detention, it is the contemporaneous legislation in conjunction with this proposed amendment that will allow Pennsylvania to implement a bail system that is less reliant on defendants’ monetary resources and more focused on community safety. Here,

229. PA. CONST. art. XI, § 1.

230. PA. CONST. art. I, § 14.

231. See 18 U.S.C. § 3142(e)(1) (2018).

232. United States v. Salerno, 481 U.S. 739, 753 (1987).

as in New Jersey, a constitutional amendment, in conjunction with legislation, serves as the foundation of this proposed bail reform.²³³

The contemporaneous legislation should require magistrate district judges to make pre-trial detention decisions—favoring release—based on a pre-trial risk assessment. Pre-trial services programs within each court,²³⁴ similar to those employed in Allegheny County,²³⁵ should conduct each defendants' pre-trial risk assessment and determine the defendant's risk to the public's safety and risk of failure to appear in court. Practically, adopting the Arnold Foundation's pre-trial risk assessment throughout Pennsylvania is the most sensible solution because Allegheny County can serve as a resource to other counties in the implementation and early stages. Furthermore, because the Arnold Foundation's assessment is based on objective criteria specific to each defendant's risk of flight and risk to community safety, rather than more subjective factors,²³⁶ this type of risk-assessment tool will perpetuate a more objective system. That is essentially the goal of this reform. The legislation should permit judges to decide that some defendants, based on their risk—not the underlying crime or the amount of money in the defendant's pockets—will, in rare circumstances, need to be detained pre-trial. Legislation should make it clear that the option for pre-trial detention should only be employed in rare circumstances. It is not the underlying crime, like in Pennsylvania's current bail statute, that triggers pre-trial detention. Instead, it is the defendant's risk-assessment score that would warrant pre-trial detention, and pre-trial detention is never mandatory. Using the Arnold Foundation's PSA as an example, the rare circumstances that would permit pre-trial detention should be interpreted to apply only to defendants whose risk-assessment score is a six.²³⁷

The proposed legislation will go one step further in eliminating the use of monetary bail as a condition for release. This does not mean that release should be unconditional. Magistrate district judges should use their discretion creatively when imposing release conditions. Conditions adopted in other jurisdictions, such as in-person or over-the-phone reporting requirements,²³⁸ electronic

233. See *supra* note 170 and accompanying text.

234. The Pennsylvania Rules of Criminal Procedure allow each Court of Common Pleas to set up pretrial services programs. PA. R. CRIM. P. 530.

235. See *supra* notes 197-99 and accompanying text.

236. See *supra* notes 181-82 and accompanying text.

237. Recall that a six represents the highest possible risk-assessment score that a defendant might receive. See *supra* note 179 and accompanying text.

238. See 18 U.S.C. § 3142(c)(1)(B)(vi) (2018).

monitoring,²³⁹ maintaining residence at a particular address,²⁴⁰ curfews,²⁴¹ rehabilitative classes,²⁴² and maintaining employment²⁴³ are reasonable alternatives to pre-trial detention that a judge may choose to impose under the proposed bail system. Furthermore, as in New Jersey, the pre-trial services program that conducted the defendant's risk assessment and monitors the defendant's release conditions could call, text, or email defendants to ensure appearance at their court dates.²⁴⁴ This could safeguard court resources, like judges', clerks', and juries' time, that may be wasted when defendants fail to appear.²⁴⁵ Unlike in New Jersey, however, Pennsylvania legislation should not contain a provision that still allows monetary bail to be set.²⁴⁶ Only a high pre-trial risk-assessment score under the proposed solution should warrant pre-trial detention.

In order for this legislation to be constitutional in Pennsylvania, there can be no constitutional Right to Bail provision, because such a provision is in direct contravention to the proposed legislation. Therefore, because it is imperative that the constitutional amendment works in conjunction with the legislation, the Pennsylvania General Assembly should take appropriate measures to ensure a constitutional amendment when proposing the legislation.²⁴⁷ Similar to New Jersey, Pennsylvania's constitutional amendment should specifically authorize the Pennsylvania legislature to enact legislation regarding pre-trial detention.²⁴⁸ The Pennsylvania legislature should also take appropriate measures to ensure that the constitutional amendment and legislation are effective on the same date.

A. *The Proposed Bail Reform in Pennsylvania Bodes Bipartisan Appeal*

The proposed solution will set Pennsylvania apart as an exemplar of bail reform. The process of implementing this complete bail overhaul is certainly not simple, but with the right strategy in place it is achievable. Forty-five percent of individuals surveyed in a 2016

239. See *supra* note 185 and accompanying text.

240. See 18 U.S.C. § 3142(c)(1)(B)(iv) (2018).

241. See *id.* § (B)(vii).

242. See *id.* § (B)(iii).

243. See *id.* § (B)(ii).

244. See *supra* note 186 and accompanying text.

245. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 14.

246. N.J. STAT. ANN. § 2A:162-15 (2017).

247. See PA. CONST. art. XI, § 1.

248. See *supra* note 170 and accompanying text.

Gallup poll reported that the criminal justice system is not tough enough on crime, with only fourteen percent reporting that it was too tough and another thirty-five percent saying it was appropriate.²⁴⁹ The referendum vote must appeal to the public at large in order to pass; therefore, the language of the constitutional amendment will require phrasing that takes a more tough-on-crime approach, like in New Jersey.²⁵⁰ This tough-on-crime language suggestion is not to be perceived as a tactic to mislead the public. On the contrary, while the proposed solution is certainly designed to decrease the number of defendants detained pre-trial, this type of bail reform appeals to those who value a tough-on-crime approach as well as to those who, for a variety of reasons ranging from the recognition of flaws in the criminal justice system to a belief in alternative reforms, identify as softer on crime. Furthermore, bipartisan appeal increases the likelihood that the non-monetary bail legislation will gain enthusiastic support from both parties, increasing the likelihood of passage in the General Assembly and increasing the chance of judicial advocates fulfilling this legislation from the bench.

The proposed bail reform has bipartisan appeal for three reasons. First, appealing to conservative factions, a non-monetary bail system supports fiscal conservatism.²⁵¹ Second, appealing to liberal factions, a non-monetary bail system takes steps toward more equal justice for those without the resources to post a monetary bond with respect to the discrimination that comes with the cyclical effects of poverty. Third, appealing to both factions, a non-monetary bail system appeals to a tough-on-crime approach, as well as a softer on crime approach by using logic in the criminal justice system.

First, a non-monetary bail system appeals to fiscal conservatism. At its most basic level, it costs taxpayers money to house the defendant pre-trial.²⁵² Because this decision at the front end of the criminal justice system can increase recidivism, the current system does not respect taxpayer dollars—an increase in recidivism costs taxpayers more money long-term due to the costs associated with arrest, booking, pre-trial detention, courts, and housing should the defendant be convicted.²⁵³ Overall, the proposed solution creates a

249. *Crime*, GALLUP, <http://news.gallup.com/poll/1603/crime.aspx> (last visited Feb. 18, 2018).

250. See *supra* note 167 and accompanying text.

251. See *Criminal Injustice: Correcting a Corrections Department*, *supra* note 64.

252. See *supra* notes 88-89 and accompanying text.

253. See *Criminal Injustice: Correcting a Corrections Department*, *supra* note 64.

more fair and effective criminal justice system that starts with reducing corrections costs.²⁵⁴ In fact, the use of pre-trial services programs, like the risk-assessment tool, are proven to reduce the monetary and human cost of corrections.²⁵⁵

Second, a non-monetary bail system takes steps toward more equal justice for those without the resources to post a monetary bond with respect to the discrimination that comes with the cyclical effects of poverty. The proposed system rests on data, rather than complete discretion, and promotes consistency in pre-trial detention decisions. Because the proposed solution relies objectively on risk in determining pre-trial release, defendants' chances of pre-trial release are arguably more just because the amount of money they may have to post bond is no longer the determining factor of pre-trial release. This helps break the cyclical effects of poverty for indigent defendants. Many areas in our society already discriminate based on the amount of money an individual has, so creating a more objective foundation to our court system is crucial.²⁵⁶

Third, a non-monetary bail system appeals to both a tough-on-crime and softer on crime approach to criminal justice. On one hand, the proposed solution bases its decisions on a reasoned foundation of safety, rather than an arbitrary foundation of money. The current bail system's effect on public safety is illusory because individuals who can afford bail are released pre-trial, free to commit more crimes if they would so choose.²⁵⁷ On the other hand, the proposed solution will promote safety because without a right to bail, high-risk defendants can be detained pre-trial regardless of the underlying crime. This solution appeals to safety because it roots pre-trial detention decisions in the *objective* element of risk to the public.

Additionally, the proposal might appeal to individuals who may identify as softer on crime because it promotes logic in our criminal justice system. Critics of the criminal justice system and, more specifically, a monetary bail system, often cite the arbitrariness of wealth as the determining factor in whether a defendant is detained pre-trial.²⁵⁸ The proposed solution, however, is not based on the arbitrary factor of money and rather the objective factor of the de-

254. H.B. 1092, 201st Gen. Assemb., Reg. Sess. (Pa. 2017).

255. Memo on H.B. 1092, *supra* note 68.

256. Examples include access to housing, education, competitive jobs, healthcare, and nutritious foods.

257. See *supra* note 100 and accompanying text.

258. See *supra* note 62 and accompanying text.

fendant's risk to the public. This solution combats the over-detaining of defendants because a judge may be uncertain of a defendant's risk to the public. Overall, the solution appeals to a more well-reasoned, practical court order.

Under the proposed solution, judges can predict risk and make informed decisions based on objective factors. Regardless of an individual's stance on crime or political leanings, all can agree that a pre-trial detention system rooted objectively in public safety *should* be the focus of the Pennsylvania General Assembly.

B. The Benefits of the Proposed Bail Reform Outweigh the Drawbacks

The proposed solution does not come without potential drawbacks. First, this solution will likely destroy the bail bondsman industry.²⁵⁹ Second, some conditions of pre-trial release, like electronic monitoring or rehabilitation classes that impose a cost on defendants, may still perpetuate the problems of a monetary bail system in a new manner. Finally, the referendum vote risks an *increase* in pre-trial detention if the legislature does not respond with non-monetary bail reform legislation.

First, this solution will likely destroy the bail bondsman industry, similar to what occurred in New Jersey.²⁶⁰ The bail bondsman industry, however, is highly criticized. Some bail bond companies will not help defendants post bail for low amounts.²⁶¹ The industry is known for its aggressive pricing practices and coerciveness toward defendants.²⁶² Bail bondsmen use tactics known as "bail capping," where they compensate jailed inmates in exchange for recruiting new clients.²⁶³ Inmate recruiters pressure and threaten their recruits, capitalizing on the already predatory jail environment, into contracting with a bail bondsman.²⁶⁴ In return, the bail bondsman compensates their recruiters with phone calls and money on their commissary, because deposits are not tracked by the jail.²⁶⁵ Outside of the United States, the only other country in the world

259. See *supra* note 191 and accompanying text.

260. See *id.*

261. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 12-13.

262. *Id.* at 13.

263. Sukey Lewis, *Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years*, KQED NEWS (Apr. 10, 2017), <https://www.kqed.org/news/11393155/inside-santa-clara-jails-predatory-bail-schemes-flourished-for-years>.

264. *Id.*

265. *Id.*

that permits a bail bondsman industry is the Philippines.²⁶⁶ Because of these problems, the potential economic drawbacks that might occur from the destruction of the industry are far outweighed by the benefits of completely eliminating the problems associated with the industry—as well as the monetary bail system. Therefore, this potential drawback is not incredibly compelling.

Second, some conditions of pre-trial release, like electronic monitoring or rehabilitation classes that impose a cost on defendants, may still perpetuate the problems of a monetary bail system in a new manner. The proposed solution promotes conditional release, rather than pre-trial detention. Some release conditions, however, could still perpetuate the problems associated with a monetary bail system because they impose costs on defendants. If a defendant has to pay for his or her conditions of release, it is essentially the same as paying a bond in exchange for release. For example, in Allegheny County, electronic monitoring as a condition of release requires that the defendant pay for fees.²⁶⁷ Judges might also impose rehabilitation classes as a condition of defendants' release, at the cost of the defendant. Because these types of conditions impose a cost on the released defendants, the problems associated with monetary bail are perpetuated, despite defendants' release. Therefore, to prevent this potential drawback the proposed legislation must include sufficient safeguards. One such safeguard might be to use financial information, collected through the pre-trial assessment program, to ensure that any pre-trial release conditions that may cost a defendant money do not exceed a certain amount of the defendants' income.²⁶⁸ Another safeguard might be to impose *no* costs on defendants' conditions. Therefore, because the potential safeguards that can be drafted into the legislation can prevent the problems associated with the monetary bail system from re-manifesting in conditional release measures, this potential drawback is not particularly compelling.

Finally, the most compelling of potential drawbacks is that the referendum vote risks an *increase* in pre-trial detention if the legislature does not respond with non-monetary bail reform legislation. This risk could make the current system worse by perpetuating, and intensifying, the problems associated with the current system. The proposed constitutional amendment, without corresponding legislation that eliminates monetary conditions of release and

266. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 13.

267. *Adult Probation Special Units*, FIFTH JUD. DISTRICT PA., https://www.alleghe-nycourts.us/criminal/adult_probation/special_units.aspx#a7 (last visited Feb. 5, 2019).

268. See CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 12, at 10.

maintains a presumption of release unless the risk assessment indicates otherwise, opens the door to detain even more defendants than Pennsylvania's current system. Judges could choose to detain *any* or *every* defendant pre-trial. This risk is great because all problems currently associated with a monetary bail system would likely be amplified should the constitutional Right to Bail provision be eliminated without being complimented with proper legislation. Therefore, in order to prevent this problem, the Pennsylvania legislature should take appropriate measures to ensure the constitutional amendment specifically authorizes the Pennsylvania legislature to draft legislation regarding pre-trial detention, and legislation should be effective on the same date as the amendment. By using New Jersey's reform action plan and timelines as a template, Pennsylvania can mitigate the risk that the constitutional amendment might increase the likelihood that defendants are detained pre-trial. Furthermore, the proposed legislation must have enthusiastic advocates in the Pennsylvania's General Assembly, as well as from the bench, to ensure compliance and prevent amendments that could change the legislation's purpose of *decreasing* pre-trial detention. While this potential drawback may be the most risky, by using New Jersey as a model, the risk of increasing pre-trial detention and perpetuating the problems of the current system can be mitigated.

IX. CONCLUSION

Understanding the history and purpose of bail in our criminal justice system and Pennsylvania's current monetary bail system helps provide a foundation to build the reform of Pennsylvania's bail system.

There are glaring practical problems and injustices associated with Pennsylvania's current monetary bail system, particularly for the accused. The bail system undermines its own purpose of ensuring appearance in court. Long-term, the bail system has negative impacts on the criminal justice system as a whole. Courts, scholars, empirical data, and the current literature have all revealed and addressed problems associated with a bail system. Themes of this work reveal the importance of protecting liberty and also allowing for monetary bail alternatives, particularly for indigent defendants. The existing literature calls for reform to current bail systems.

Other jurisdictions have implemented bail reforms that promote pre-trial release, community safety, and ensuring appearance. Similar to these jurisdictions, Pennsylvania has taken steps in the

right direction with the implementation of risk-assessment tools in some counties and the General Assembly's recognition of the importance of implementing risk-assessment tools in *all* counties. The data in Pennsylvania, however, show that the use of risk-assessment tools alone is insufficient. Therefore, more radical change is necessary.

This article proposes a solution to Pennsylvania's current bail system that shifts to a non-monetary bail system. Through amending Pennsylvania's Constitution and enacting concurrent legislation, Pennsylvania can begin to combat the problems associated with the current system. The proposed solution, rooted in logic and justice, appeals to all constituents, regardless of political leaning or position on crime. Finally, the benefits of the reform outweigh any potential drawbacks.

Most importantly, the proposed solution is designed to help people. If this solution is adopted in Pennsylvania, defendants like Mustafa Willis²⁶⁹ may be able to navigate the criminal justice system in a more objective and fair manner.

269. See *supra* note 1 and accompanying text.